IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 26 OF 2002.

Shri Vijayanand Venktesh Naik,
resident of House No. 104,
Shirvodem, Navelim, Salcete,
Goa. ... Appellant.

Versus

1. Shri Thomas Rodrigues,
   r/o H.No. 10, 'Pinto
   Bar', Cavelossim Road,
   Varca, Salcete, Goa.
2. State through Public
   Prosecutor, Panaji. ... Respondents.

Mr. S.S. Kakodkar, Advocate for the Appellant.

Mr. N. Sardessai, Advocate for the Respondent No. 1.

Coram: P.V. HARDAS, J.

Date: 4th July 2002.

ORAL JUDGMENT.

This Criminal Appeal has been filed by the original complainant challenging the acquittal of the respondent/accused by the Additional Sessions Judge, Margao, in Criminal Appeal No. 7 of 2001, acquitting the respondent/accused for an offence punishable under Section 138 of the Negotiable Instruments Act.

2. By consent of the parties, this Criminal Appeal is taken up for final hearing. The complainant has annexed the complaint and evidence of the witnesses as also the Judgments of the two Courts below.

3. Mr. Kakodkar, the learned counsel appearing for the appellant, has urged before me that the cheque

for Rs. 30,000/- issued by the respondent/accused was towards the payment of the share of the complainant on his retirement from the partnership firm. According to the learned counsel for the appellant, the learned Judicial Magistrate, First Class, on consideration of the evidence had convicted the respondent/accused. According to him, the learned appellate Court was in error in holding that the complainant had not been able to prove that the notice had been received by the respondent/accused.

4. The appellant/complainant, on bouncing of the cheque, had issued notice by registered post. The said notice is at Exhibit 14. The notice was addressed to the respondent/accused on two addresses. The postal acknowledgements are Exhibit 14/2 and 14/3. Admittedly, both the acknowledgements do not bear the signature of the respondent/accused. The appellant/complainant examined himself as P.W.1 and in the cross-examination he was confronted with the postal acknowledgement at Exhibit 14/2. The appellant/complainant was unable to identify the signature on Exhibit 14/2. Similarly P.W.2 Shashikant P. Sawant, the Bank Manager, was unable to identify the signature of the respondent/accused. On comparison with the signature, P.W.2 has stated that the acknowledgements do not bear the signature of the respondent/accused. P.W.3 Ganesh Velip, a postman who

was examined by the complainant, has also stated in the cross-examination that he cannot verify the signature on the A.D. card. He also could not say whether the signature on the A.D. card was that of the respondent/accused or not. In fact, the learned trial Court in paragraph 19 of the Judgment has observed that on the A.D. card, Exhibit 14/3 the signature of one Amonkar appears. In this background, the learned appellate Court, therefore, held that the appellant/complainant had not been able to establish that the notice was actually received by the respondent/accused. The appellate Court, therefore, came to the conclusion that in the absence of conclusive proof of service of notice, no presumption could be raised that the accused had received the said notice.

5. It is urged by Mr. Kakodkar, the learned counsel appearing for the appellant/complainant that it is immaterial whether the accused received the notice so long as the complainant is able to establish that he had issued the notice. This submission of the learned counsel for the appellant/complainant is completely ill-founded and without any basis. It is the failure on the part of an accused to pay the amount of cheque within 15 days of the receipt of the notice, which furnishes the cause of action for filing of the prosecution against him. If the prosecution at the very

threshold fails in establishing that a notice has been duly received by the accused, the prosecution so launched is bound to fail. The learned appellate Court has re-appreciated the evidence and has come to a finding that the prosecution has not been able to establish that the accused had received the notice. This is an appeal against acquittal and no perversity in the reasoning of the lower appellate Court has been demonstrated which would warrant admission of this Appeal. There is no substance in the present Appeal and the same deserves to be dismissed.

6. In the result, therefore, Criminal Appeal is dismissed in limine.

(P.V. HARDAS)
JUDGE.

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